

ORIGINAL

**BEFORE THE
FEDERAL MARITIME COMMISSION**

**Petition of United Parcel Service, Inc.
Petition No. P3-03**

**Petition of C.H. Robinson Worldwide, Inc.
Petition No. P9-03**

**Petition of the National Customs Brokers
and Forwarders Association of American,
Inc.
Petition No. P5-03**

**Petition of Danzas Corporation d/b/a Danmar
Lines Ltd., Danzas AEI Ocean Services, and
DHL Danzas Air and Ocean
Petition No. P1-04**

**Petition of Ocean World Lines, Inc.
Petition No. P7-03**

**Petition of BDP International, Inc.
Petition No. P2-04**

**Petition of BAX Global Inc. Petition No.
P8-03**

**Petition of FedEx Trade Networks Transport
& Brokerage, Inc.
Petition No. P4-04**

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**REPLY OF THE NATIONAL CUSTOMS BROKERS
AND FORWARDERS ASSOCIATION OF AMERICA, INC.
TO JOINT SUPPLEMENTAL COMMENTS REQUESTING EXPEDITED
ADOPTION OF A CONDITIONAL EXEMPTION FROM TARIFF PUBLICATION**

Submitted By

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**Transportation Counsel, The National Customs Brokers
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Dated: September 8, 2004

On August 2, 2004, several of the petitioners in the above-referenced dockets and two associations (The National Industrial Transportation League, or "NITL, and the Transportation Intermediaries Association, or "TIA") filed a document entitled Joint Supplemental Comments Requesting Expedited Adoption Of A Conditional Exemption From Tariff Publication ("Joint Supplemental Comments"). Although the National Customs Brokers and Forwarders Association of America, Inc. ("NCBFAA") supports the relief sought in the Joint Supplemental Comments, it did not sign onto that document and it is instead constrained to file this reply so that the Commission can have the benefit of the views of the large number of NVOCC's, both in the U.S. and abroad, that are represented by the Association.

The NCBFAA agrees that it is the time for the Commission to respond directly to the various exemption petitions filed by the NCBFAA and individual petitioning NVOCC's that have called for meaningful, necessary and appropriate regulatory reform. The NCBFAA's request for a limited exemption from the tariff publication requirements of the Shipping Act was filed over a year ago; that is also the case with respect to most of the other exemption petitions. Extensive evidence of the need for reform has been presented to the Commission and supporting and opposing parties have had two separate opportunities to present their respective views; it now appears that a third round of filings is likely so that the industry is able to respond to the Joint Supplemental Comments. Nevertheless, a compelling case for change has long since been made and the continued passage of time will yield nothing more than redundant "me-too" submissions by other parties or NVOCC's that feel the need to file something in view of the Commission's silence on those issues.

The Commission already has an ample record that would both support and justify a grant of the various exemption petitions. As the NCBFAA has already pointed out in its Reply

Comments (at least with respect to the tariff exemption it has sought in Docket No. P5-03), there is no need for a rulemaking and there are no new rules that need be promulgated; the Commission can properly issue the sought exemptions in precisely the same manner it has in the past when responding to petitions sought by VOCC's. There is nothing to be gained at this juncture by initiating any fact-finding investigation, rulemaking or other proceeding. To the contrary, such delays would only further postpone the day when clearly wasteful, inefficient regulation is lifted from the NVOCC industry.

The NVOCC industry is, for the first time, united in recognizing and advocating the un rebutted and self-evident need to eliminate wasteful, inefficient regulation. While the various petitioners have offered several approaches to remedy the well documented inefficiencies and restrictions that currently burden this industry, the unchallenged evidence of record is that there is a need for change and both the NVOCC industry and the shippers they serve are now united in the push to bring ocean transportation into the 21st Century. Over 60 NVOCC's submitted evidence detailing the rate negotiation process, the burdens and costs imposed by rate tariff publications, the inefficiencies and problems inherent in such an archaic system and the fact that such rate tariffs simply no longer serve any useful purpose.¹

Having said that, the NCBFAA believes that the proposal set forth in the Joint Supplemental Comments does not go far enough in answering the most urgent needs of the NVOCC community as a whole. Although that proposal would provide some short-term relief for those parties, the NCBFAA believes that more must be accomplished. While that proposal would be available to all NVOCC's, regardless of size or some arbitrary determination of assets,

¹ In addition, the United States Departments of Justice and Transportation have also submitted extensive and well-informed views supporting the changes sought by the various NVOCC petitioners.

it would still require that (1) the negotiated agreements between NVOCC's and their customers be filed with the FMC and (2) the essential terms of those agreements be filed in tariff form. By imposing these requirements, the significant cost and inefficiencies and obligations that currently fall upon the NVOCC industry have not been adequately addressed.²

If these costs and burdens had any countervailing benefit, one could then posit some justification for the imposition of such requirements to NVOCC's. But that, of course, is not the case, and no one has suggested, let alone demonstrated, how NVOCC's or shippers would benefit by transforming the burden and expense of tariff publication into the burden and expense of service contract filing and essential term publication. The record is certainly clear that virtually no shipper or competitor has ever accessed an NVOCC tariff publication; there is little reason to believe that the situation would somehow change if the publication now becomes simply an essential terms compilation. Nor has anyone suggested who would ever want to review the service contracts that NVOCC's would now be filing with the Commission, or what they would review if they did look at those agreements.

Moreover, the NCBFAA has previously pointed out that the filing of service contracts and publication of their essential terms were primarily designed to facilitate the Commission's oversight of VOCC's in order to prevent abuse of the anti-trust immunity they enjoy.³ As

² Consequently, it is important to understand that the approach advocated in the Joint Supplemental Comments is not consistent with the relief sought by NCBFAA, contrary to the incorrect suggestion of other commenting parties. (See Comment of Danzas Corporation, Limited, dated August 17, 2004, filed in Docket Petition No. P1-04, at 2.)

³ See Comments of the NCBFAA to petitions filed by United Parcel Service, Inc., Ocean World Lines, Inc., BAX Global, Inc. and C.H. Robinson Worldwide, Inc., filed October 10, 2003, at 17-18.

NVOCC's do not have anti-trust immunity, there is no rational basis that would support, let alone require, the filing of NVOCC service contracts or publication of essential terms.⁴

One rationale occasionally advanced for NVOCC service contract filing is the old "level playing field" shibboleth. In other words, if VOCC's have to file service contracts, it is only fair that NVOCC's should have to do likewise. Yet, it is perfectly clear that VOCC's and NVOCC's are not equal in all other respects, not the least of which is the issue of anti-trust immunity and the VOCC's' favored status under the Foreign Shipping Practices Act. Moreover, VOCC's and NVOCC's are functionally different, as VOCC's are essentially wholesalers to the NVOCC industry, while NVOCC's are retailers to their underlying customers. No NVOCC cargo could possibly move if the company was unable to enter into rate and service arrangements that were acceptable to the VOCC servicing that account. Accordingly, NVOCC's and VOCC's do not always stand in the same shoes. When it comes to service contract filing, the "level playing field" is a fiction whose only real function would be to minimize the benefits that would otherwise result from awarding service contract authority to NVOCC's. That is more akin to "bait and switch" tactics, not sound public policy.

The question thus becomes, why pretend that service contract filing and essential terms tariff publication by NVOCC's serves any valid public policy, when the entire industry understands that this is not the case? While the requirement of this nature may provide a façade of governmental oversight, in reality it would be an empty, albeit expensive and inefficient, gesture. A filing of this nature would have no more value to the Commission or the public than

⁴ The only other rationale supporting the publication of essential terms was that maritime labor organizations would find such information useful for determining cargo flows. S. Rep. 105-61, 105th Cong., 1st Sess. 24 (July 31, 1997). Since maritime labor can obtain whatever information it needs from the VOCC's and quite clearly does not access NVOCC tariffs today for any reason, there is no purpose to be served -- other than needless NVOCC harassment -- by requiring the publication of any essential terms of NVOCC/shipper rate agreements.

does the current rate tariff publication system. The Commission and the industry have had six years of experience under OSRA, and it is now time to exercise the authority Congress gave the FMC in Section 16 to eliminate needless, expensive and inefficient regulation.

The exemption petition filed by the NCBFAA addresses this head-on. It directly and forthrightly seeks to permit NVOCC's to continue to respond to their customers in the way the industry has evolved since OSRA; namely, by continuing to negotiate rate and service offerings on an individual basis without going through the formality of memorializing those arrangements in tariff form before moving the traffic. By eliminating the substantial transactional costs and inefficiencies associated with tariff publication, the tariff exemption responds to all of the goals and needs addressed by the various petitioners without burdening the relief with unnecessary baggage that has no corresponding public benefit.

In granting this exemption, the Commission would not be shirking its responsibilities to oversee the ocean transportation industry. Once the NVOCC's have negotiated rates with their customers, that rate would become the lawful rate just as it is today, except that it would not need to be published in tariff form. Although the NCBFAA's original petition did not suggest any particular mechanism by which the negotiated rates would be memorialized, the Commission can clearly condition the grant of exemption in a way that NVOCC's seeking to take advantage of it would be required to set forth the essential terms of those arrangements on a document that is to be retained in its files. For example, such a condition might require that NVOCC's specify, in this document, the origin and the destination port ranges and/or inland geographic areas for through intermodal shipments, the commodities, any minimum volumes, line-haul rates, duration of the arrangements, service commitments and any relevant liquidated damages or indemnity provisions for non-performance.

Thus, the Commission, the NVOCC's and the shippers would still have access to the same information which is available today. The industry, however, would be spared the costs, delay and burdensome formality of having to put this information into electronic tariffs that no one would likely ever review. Nonetheless, in the event of a dispute or alleged malpractice, the Commission would still have the ability to either bring enforcement action or serve as an adjudicative tribunal of issues arising under the Act.

Consequently, while it does not oppose the service contract petitions filed by the various petitioners and has no objection to the modified approach sought in the Joint Supplemental Comments as an additional procedure, the NCBFAA believes that the tariff exemption proposed in Docket No. P5-03 is the most appropriate vehicle which with to address the universally acknowledged problems caused by the anachronistic rigidity and cost of the tariff publication system.

The NCBFAA accordingly urges the Commission promptly to utilize its exemption authority based on the clear record that has already been developed in these various dockets. All parties have already had ample opportunity to present evidence and their views; the initiation of any new proceedings would unnecessarily delay relief and continue the current system of costly, burdensome and unnecessary regulation.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have this 8th day of September, 2004, served a copy of the foregoing Reply Of The National Customs Brokers And Forwarders Association Of America, Inc. To Joint Supplemental Comments Requesting Expedited Adoption Of A Conditional Exemption From Tariff Publication on the following persons listed below via first-class mail, postage pre-paid:

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